(2)

No. 91-871

In the Supreme Court of the United States

OCTOBER TERM, 1991

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

KENNETH W. STARR
Solicitor General

MAUREEN E. MAHONEY
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

KERRY L. ADAMS
Counsel for Appellate Litigation

ELIZABETH HOPKINS
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether, under the Longshore and Harbor Workers' Compensation Act, the amount of benefits payable to a retired claimant who suffered an employment-related hearing loss is calculated (a) under 33 U.S.C. 908(c)(13), which provides a scheduled award for loss of hearing; (b) under 33 U.S.C. 908(c)(23), which provides benefits when a worker's disability occurs after retirement; or (c) under a hybrid approach that uses parts of both 33 U.S.C. 908(c)(13) and 908(c)(23).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Aduddell v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131 (1984) 2, 3, 12

Alabama Dry Dock & Shipbuilding Corp. v. *Sowell*, 933 F.2d 1561 (11th Cir. 1991) 10, 13, 14

American Ship Building Co. v. *Director, OWCP*, 865 F.2d 727 (6th Cir. 1989) 15

Director, OWCP v. *Bethlehem Steel Corp.*, 949 F.2d 185 (5th Cir. 1991) 16

Director, OWCP v. *General Dynamics Corp.*, 900 F.2d 506 (2d Cir. 1990) 15

Dunn v. *Todd Shipyards Corp.*, 13 Ben. Rev. Bd. Serv. (MB) 647 (1981) 3

Ingalls Shipbuilding, Inc. v. *Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990) 7, 9, 10, 11, 12, 13

Lollar v. *Alabama By-Products Corp.*, 893 F.2d 1258 (11th Cir. 1990) 15

Machado v. *General Dynamics Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 176 (1989) 7

McDonald v. *Director, OWCP*, 897 F.2d 1510 (9th Cir. 1990) 15

Newport News Shipbuilding & Dry Dock v. *Director, OWCP*, 681 F.2d 938 (4th Cir. 1982) 3, 15

Phillips v. *Marine Concrete Structures, Inc.*, 877 F.2d 1231 (5th Cir. 1989) 15

Potomac Elec. Power Co. v. *Director, OWCP*, 449 U.S. 268 (1980) 2, 9, 13, 15

Redick v. *Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. (MB) 155 (1984) 3, 9, 12, 13

Sea-Land Service, Inc. v. *Rock*, No. 91-3161 (3d Cir. Jan. 7, 1992) 15

Cases—Continued:	Page
Southern Pac. Co. v. *Jensen*, 244 U.S. 205 (1917)	16
Travelers Ins. Co. v. *Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955)	9, 13
Worrell v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Serv. (MB) 216 (1983)	3
Statutes and regulations:	
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:	
§ 2(10), 33 U.S.C. 902(10)	4, 9
§ 8, 33 U.S.C. 908	2
§ 8(c), 33 U.S.C. 908(c)	2, 4
§ 8(c)(13)(B), 33 U.S.C. 908(c)(13)(B)	4
§ 8(c)(13)(D), 33 U.S.C. 908(c)(13)(D)	5
§ 8(c)(19), 33 U.S.C. 908(c)(19)	4
§ 8(c)(21), 33 U.S.C. 908(c)(21)	2
§ 8(c)(23), 33 U.S.C. 908(c)(23)	4
§ 10(d)(2)(A), 33 U.S.C. 910(d)(2)(A)	4
§ 10(d)(2)(B), 33 U.S.C. 910(d)(2)(B)	4, 6
§ 10(i), 33 U.S.C. 910(i)	3, 8, 11, 13, 14
§ 12(a), 33 U.S.C. 912(a)	3
§ 13(a), 33 U.S.C. 913(a)	3
§ 13(b)(2), 33 U.S.C. 913(b)(2)	3
§ 44, 33 U.S.C. 944	6, 7
20 C.F.R. 702.212	15
20 C.F.R. 702.221(b)	5
Miscellaneous:	
American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (rev. 3d ed. 1990)	4
130 Cong. Rec. (1984):	
pp. 25,902-25,903	12
p. 26,300	12
50 Fed. Reg. 389 (1985)	16
H.R. Conf. Rep. No. 1027, 98th Cong., 2d Sess. 1984)	12, 14
H.R. Rep. No. 570, 98th Cong., 1st Sess. (1984)	14-15
R. Sataloff & J. Sataloff, *Occupational Hearing Loss* (1987)	12

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-871

BATH IRON WORKS CORPORATION, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 942 F.2d 811. The decision and order of the Benefits Review Board (Pet. App. 21-30) is reported at 24 Ben. Rev. Serv. (MB) 89 and the decision and order of the administrative law judge (Pet. App. 31-47) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1991. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Prior to 1984, Section 8 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 908, provided two systems for compensating permanently partially disabled workers. The first system (System One)[1] covers workers suffering one of the "scheduled" injuries listed in Section 8(c)(1)-(20), 33 U.S.C. 908(c)(1)-(20). The formula set out in System One provides that the injured worker is entitled to two-thirds of his average weekly wage for a finite number of weeks (ranging from 16 to 312), depending upon the type of injury. 33 U.S.C. 908(c). The injuries listed in the System One schedule are compensated at the specified amount "regardless of whether [the employee's] earning capacity has actually been impaired." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 269 (1980). The second system (System Two), which is not directly at issue in this case, is used to compensate workers for injuries that are not listed in the "schedule." 33 U.S.C. 908(c)(21). The formula set out in System Two provides that a worker receives two-thirds of the difference between his average weekly wage prior to the injury and his residual earning capacity for as long as the disability persists. *Ibid.*

In *Aduddell* v. *Owens-Corning Fiberglass*, 16 Ben. Rev. Bd. Serv. (MB) 131, 133 (1984), the Benefits Review Board held in a case arising under System Two that a claimant who voluntarily retired prior to the manifestation of asbestosis (which is not a scheduled injury) was not entitled to any compensation because he could not establish that his injury caused

[1] In this brief, we have used the First Circuit's terminology regarding the three compensation "systems" under the LHWCA. See Pet. App. 2-3.

any loss of wage-earning capacity. Accord *Worrell* v. *Newport News Shipbuilding & Dry Dock Co.*, 16 Ben. Rev. Bd. Serv. (MB) 216 (1983); *Dunn* v. *Todd Shipyards Corp.*, 13 Ben. Rev. Bd. Serv. (MB) 647 (1981); see also *Newport News Shipbuilding & Dry Dock* v. *Director, OWCP*, 681 F.2d 938, 942 (4th Cir. 1982). The Board extended the *Aduddell* principle to System One in *Redick* v. *Bethlehem Steel Corp.*, 16 Ben. Rev. Bd. Serv. (MB) 155 (1984), and held that a person who filed a claim for hearing loss—which is a scheduled injury—six months after he retired was not entitled to benefits because he could not show that the injury impaired his earning capacity.

In 1984, Congress reacted to the inequity it perceived in the Board's treatment of retirees in the *Aduddell* line of cases. The amendments created a third scheme (System Three) to compensate retired workers whose diseases manifest themselves after retirement. Section 10(i), 33 U.S.C. 910(i), defines the "time of injury" for a claim involving a disease "which does not immediately result in death or disability" as "the date on which the employee or claimant becomes aware [or should have become aware] * * * of the relationship between the employment, the disease, and the * * * disability."[2] For purposes of the formula set forth for computing benefits under

[2] The 1984 amendments provided that the worker must notify the Department of Labor and the employer of "an occupational disease which does not immediately result in a disability or death" within one year after he becomes aware (or should have become aware) of the relationship between the disease and his employment, and must file a claim within two years. 33 U.S.C. 912(a), 913(b)(2). With respect to all other injuries, the worker must give notice within 30 days and file a claim within one year of the injury. 33 U.S.C. 912(a), 913(a).

System Three, the claimant's average weekly wages during his final year of work are used if the "time of injury" is within the first year after retirement. 33 U.S.C. 910(d)(2)(A). If the "time of injury" is more than one year after retirement, then the national average weekly wage at that time is used. 33 U.S.C. 910(d)(2)(B). In either case, the formula for calculating benefits under System Three calls for multiplying two-thirds of the appropriate average weekly wage by the worker's percentage of permanent impairment as determined by the *Guides to the Evalu-*more than one year after retirement, then the national *ation of Permanent Impairment* (rev. 3d ed. 1990), which is published by the American Medical Association. 33 U.S.C. 908(c)(23); see 33 U.S.C. 902(10). The claimant is entitled to weekly benefits for the duration of the impairment. 33 U.S.C. 908(c)(23).

The benefits awarded under System Three may be greater than those awarded under System One because an award under System Three is paid weekly for as long as the worker is impaired rather than for a scheduled number of weeks. On the other hand, the award under System Three may be less than the award under System One because an award under System Three is based on the impairment of the "whole person."[3] And the amount of benefits payable under System One and System Three may differ be-

[3] For example, under System One, the respondent, Ernest C. Brown, would be entitled to two-thirds of his average weekly wage during the last year he worked for the number of weeks prescribed in Section 8(c). Section 8(c)(13)(B) provides for 200 weeks of recovery in the case of a binaural hearing loss; under Section 8(c)(19), that period would be reduced because Brown sustained an 82.4% hearing loss rather than a total hearing loss, so that he would receive an award for about 165 weeks (200 weeks times .824). But an 82.4% hearing loss translates into a 29% impairment of the "whole person" under the AMA Guide. Pet. App. 23. Thus, under System Three, Brown would receive a lower weekly payment—two-thirds of the applicable weekly wage times .29. However, under System Three he would receive the award for as long as he was impaired.

cause the worker's average weekly wage (which is always used under System One) may be more or less than the national average weekly wage at the time of injury (which is used under System Three when the time of injury is more than one year after the worker retires).

The 1984 amendments did not change the basic principles governing System One or System Two. However, Congress changed the rules governing the time within which to file a hearing loss claim under System One by adding Section 8(c)(13)(D), 33 U.S.C. 908(c)(13)(D), which provides that "[t]he time for filing a notice of injury * * * shall not begin to run in connection with any claim for loss of hearing under this section, until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." See also 20 C.F.R. 702.221(b). Thus, a worker who suffers a hearing loss, but does not recognize that his hearing has been impaired, does not lose his claim on account of the passage of time.

2. The claimant in this case, Ernest C. Brown, worked for petitioner Bath Iron Works from 1939 until 1947, and again from 1950 until his retirement in 1972. Pet. App. 22. In 1985, after receiving the results of an audiogram that indicated an 82.4% hearing loss in both ears, Brown applied for benefits. *Id.* at 9.[4] The administrative law judge found that

[4] Brown relied on the tolling provision for scheduled hearing losses under System One, Section 8(c)(13)(D), to excuse

Brown's "hearing loss resulted, in part, from * * * acoustic trauma experienced while * * * employed at the Bath Iron Works shipyard and thus his hearing loss arose out of and in the course of his employment in Bath Iron Works." Pet. App. 39.

The ALJ, applying the approach sanctioned by the Benefits Review Board, then used a hybrid method to calculate benefits. He first turned to System Three and concluded that the "time of injury" for purposes of determining Brown's average weekly wage was September 6, 1985, when Brown received the results of the audiogram. Pet. App. 40. The ALJ accordingly utilized the national average weekly wage rate under System Three, 33 U.S.C. 910(d)(2)(B), to calculate the amount of scheduled benefits for hearing loss under the formula set out in System One. *Id.* at 37-38. In other words, he used the national average weekly wage on September 6, 1985, as provided under System Three, in place of Brown's weekly wage in the formula set out in System One, but limited the award to a total of 165 weeks, as set forth in System One, instead of awarding compensation for the indefinite future, as set forth in System Three. See note three, *supra*.[5]

---

the 13-year gap between the time that he stopped working and the time that he filed his claim. The administrative law judge held that Brown's "claim is not time barred" because Brown did not receive an audiogram and accompanying report until 1985. Pet. App. 36. Bath Iron Works has not challenged that conclusion.

[5] The ALJ also determined that Bath Iron Works was entitled to relief from the "special fund" established by 33 U.S.C. 944 because Brown had a preexisting disability that was aggravated by his working conditions. Specifically, the ALJ allocated the liability for Brown's 82.4% hearing loss such that the fund was liable for payments based on a 40.6%

The Board upheld the ALJ's determinations. Relying on its prior en banc decision in *Machado* v. *General Dynamics Corp.*, 22 Ben. Rev. Bd. Serv. (MB) 176 (1989), and the Fifth Circuit's decision in *Ingalls Shipbuilding, Inc.* v. *Director, OWCP*, 898 F.2d 1088 (1990), the Board agreed with the ALJ that the "time of injury" and, hence, the applicable average wage, was properly determined under System Three. Pet. App. 24. But the Board did not agree with the Fifth Circuit's conclusion in *Ingalls Shipbuilding* insofar as the court held that benefits should be calculated under the formula set out in System Three in a hearing loss case brought by a retired claimant. The Board instead adhered to its *Machado* decision and held that benefits must be awarded under the formula set out in System One in a hearing-loss case. *Id.* at 25. Accordingly, the Board affirmed the ALJ's use of a hybrid approach.[6]

3. The court of appeals agreed with respondent, the Director of the Office of Workers' Compensation

---

hearing loss (the hearing loss that Brown had suffered by 1954) while Bath Iron Works was responsible for the remaining 41.8% hearing loss. Pet. App. 42-43.

[6] Two of the Board's five members agreed with the Fifth Circuit's conclusion in *Ingalls Shipbuilding* that benefits should be calculated under System Three rather than the Board's hybrid approach. One of those Board members dissented on that ground (McGranery, J., Pet. App. 29-30), but the other (Stage, J., Pet. App. 27-28) concurred on the ground that the Board should adhere to its *Machado* decision until the First Circuit had an opportunity to rule on the issue. A third Board member (Brown, J., Pet. App. 28-29) agreed with the Board's hybrid approach, but dissented because he thought that Bath Iron Works should be responsible for the entire amount of Brown's award and should not obtain relief from the "special fund" established by 33 U.S.C. 944; that issue is not before the Court.

Programs, that System One should apply in its entirety. The court concluded that the statute, although seeming complex, "basically says something that is fairly simple: When the 'time of injury' occurs before retirement, the Labor Department should calculate compensation under either System One (if the injury is scheduled) or System Two (if the injury is not scheduled). When the 'time of injury' occurs after retirement, the Labor Department should calculate compensation under System Three." Pet. App. 7-8. Thus, in the court's view, the determination of which system applies does not turn on whether the claimant was working or retired when he applied for benefits, but on whether his occupational hearing loss occurred before or after retirement.

The court then agreed with the Director that occupational hearing loss, unlike diseases such as asbestosis that have a long latency period, is an injury that "a worker typically suffers *before* retirement." Pet. App. 12. The court found this conclusion supported by the scientific literature, which Bath Iron Works had not challenged, and by the Board's own characterization of Brown's hearing loss. *Ibid.* The court accordingly concluded that the law "mandate[s] compensation according to System One." *Ibid.* Indeed, the court concluded that the "language applicable to System Three makes clear that that System does not apply at all," *ibid.*, because System Three applies only to disabilities "due to an occupational disease which does not immediately result in * * * disability," 33 U.S.C. 910(i). Ascribing the "ordinary English" meaning to the statutory language, the court concluded that job-related hearing loss asserted by a retiree does not fit the System Three standard since "deafness is a disease that causes its symptoms,

namely loss of hearing, simultaneously with its occurrence." Pet. App. 13.

The court added that it was not necessary to adopt a hybrid approach such as that employed by the Board lest employees like Brown be denied recovery altogether, as the Board had held in *Redick*. In that case the Board had stated that the employee's hearing loss "manifested" itself after retirement. Thus, the Board may have erroneously believed that hearing loss has a latency period, like asbestosis, or believed that it was dealing with a special case of delayed hearing loss. Pet. App. 15. But if the Board meant that the claimant could not recover under System One, even though he had been injured before he retired, "the holding in *Redick* was simply wrong," the court concluded. *Id.* at 16. The court explained that although the Board had relied on the statutory definition of "disability," which is the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury," 33 U.S.C. 902(10), "incapacity" does not mean "failure, in fact, to earn prior wages." Rather, it has long been settled that "the statute *presumes* that a worker who suffers a scheduled injury suffers an 'incapacity because of injury to earn' prior wages." Pet. App. 16, citing *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); see also *Potomac Elec. Power Co.*, 449 U.S. at 269 (under System One the injured worker is entitled to the scheduled recovery "regardless of whether his earning capacity has actually been impaired").

The court of appeals also explicitly rejected the Fifth Circuit's approach, as expressed in *Ingalls Shipbuilding*, that System Three governed. In *Ingalls Shipbuilding* the Fifth Circuit had acknowl-

edged, but found irrelevant, the fact that hearing loss differs from asbestosis in that "the full extent of the claimants' injuries is set on the day they leave the workplace." 898 F.2d at 1093. In this case, in contrast, the First Circuit concluded that the statutory language "treats a hearing loss case differently than an asbestosis case for the very reason that the Fifth Circuit found irrelevant," *i.e.*, because "the 'time of injury' in the first case, but not the second case, is prior to retirement." Pet. App. 18.[7]

DISCUSSION

Although the decision of the court of appeals is correct, we do not oppose the petition. The decision of the court of appeals in this case is in direct conflict with the Fifth Circuit's decision in *Ingalls Shipbuilding* and with the Eleventh Circuit's more limited ruling in *Alabama Dry Dock & Shipbuilding Corp.* v. *Sowell*, 933 F.2d 1561 (1991). Moreover, the fact that the Board takes yet a third approach further disrupts the administration of the Longshore Act. The issue is significant because there are currently almost 7,000 outstanding hearing loss cases pending, the majority of which involve retirees. Benefits due these retirees are accordingly now calculated under three different formulas, with the potential for widely

[7] The court of appeals recognized that the Board had not calculated Brown's award properly under the formula set out in System One because, under its hybrid approach, it had used the national average wage (as System Three provides) rather than Brown's actual wage. But since neither Bath Iron Works nor the Director had asked the court of appeals to recalculate the award, and Brown profited since the error resulted in a higher payment, the court of appeals "consider[ed] the issue waived" and affirmed the Board's judgment. Pet. App. 19-20.

divergent results, depending upon the jurisdiction in which the claim is litigated. This defeats a central purpose of the statute—to provide uniform compensation to longshore workers nationwide.

1. a. The First Circuit acknowledged that its ruling in this case conflicts with the Fifth Circuit's decision in *Ingalls Shipbuilding*, which concerned the "identical" legal issue. Pet. App. 11. That is so. *Ingalls Shipbuilding* involved claims by three retired employees for work-related hearing loss. 898 F.2d at 1090. The Fifth Circuit agreed with the Board that the "time of injury", and therefore the applicable wage rate, is determined under System Three's Section 10(i). The court, however, reversed the Board's decision to utilize the other aspects of the formula set out in System One. The Board's decision to use parts of both systems, the court said, ignores the plain language of Section 10(i), which says that System Three applies "notwithstanding" the System One schedule. 898 F.2d at 1094, 1096.

In proceeding to decide which of the two systems governed in its entirety, the Fifth Circuit in *Ingalls Shipbuilding*, like the Board and the First Circuit here, accepted "[t]he fact that hearing loss does not progress after retirement." 898 F.2d at 1093.[8] The

[8] Petitioner does not disagree. Instead, petitioner argues, Pet. 8, that because claimants may be compensated for their entire hearing loss, including age-related hearing loss (presbycusis) occurring after retirement, it follows that their occupational injuries occurred after retirement. That argument misses the mark. Even where claimants are compensated for hearing loss that resulted from both occupational deafness and presbycusis, the fact that the presbycusis, which is not an occupational disease, progressed after retirement is irrelevant to determining when the occupational injury occurred. The scientific literature refutes the notion that occu-

Fifth Circuit nonetheless concluded that hearing loss is covered by System Three, which encompasses only injuries from "an occupational disease which does not immediately result in death or disability." Section 10(i); see 898 F.2d at 1092-1094.

Instead of following the statutory language, which provides that System Three is not applicable to job-related hearing loss that occurs before retirement, the Fifth Circuit relied on the legislative history of the 1984 amendments. Specifically, the *Ingalls Shipbuilding* court placed great weight on the fact that Senator Hatch, a sponsor of the 1984 amendments, listed *Redick* (the Board's opinion holding that a retired claimant is not entitled to benefits for hearing loss) as one of several cases that were inconsistent with "equitable policy." 130 Cong. Rec. 26,300 (1984). The Fifth Circuit read Senator Hatch's comment as establishing that Congress intended that hearing loss claims be treated the same as claims based on progressive occupational diseases. 898 F.2d at 1093. As the First Circuit recognized in this case, however, the Fifth Circuit's reliance on Senator Hatch's remark "seeks to prove far too much on the basis of far too little." Pet. App. 17. Senator Hatch's remark is the only reference to *Redick* in a legislative history of the 1984 amendments, which focused on latent diseases, such as asbestosis, that actually develop and progress after retirement.[9] The important

---

pational hearing loss progresses after retirement. See R. Sataloff & J. Sataloff, *Occupational Hearing Loss* 357 (1987).

[9] In contrast, Representative Miller twice mentioned the Board's asbestosis decision in *Aduddell*, without mentioning *Redick*. 130 Cong. Rec. 25,902-25,903 (1984). So too, the conference report mentions *Aduddell* without mentioning *Redick*. H.R. Conf. Rep. No. 1027 (Conf. Rep.), 98th Cong., 2d Sess. 30 (1984).

point about Senator Hatch's remark is that he thought that *Redick* did not represent "equitable policy." In fact, as the First Circuit suggested, Pet. App. 15-17, *Redick* was incorrectly decided under the pre-1984 law. Contrary to the Board's reasoning, evidence of actual loss of wages or wage-earning capacity has never been required under System One, because the schedule *presumes* the loss. See *Potomac Elec. Power Co.*, 449 U.S. at 276-277 & n.15, citing *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137, 144 (2d Cir.), cert. denied, 350 U.S. 913 (1955). In any event, the Fifth Circuit erred in relying on legislative history to overcome the clear statutory language, which shows that System Three applies only to injuries or diseases, unlike Brown's hearing loss, which do "not immediately result" in disability. 33 U.S.C. 910(i).

b. The First Circuit's decision in this case is also at odds with the Eleventh Circuit's decision in *Alabama Dry Dock*. That case involved a hearing loss claim by a self-employed individual, rather than a retiree, and the court was not called upon to decide how to calculate benefits for retirees with occupational hearing loss. Like the Fifth Circuit in *Ingalls Shipbuilding*, however, the Eleventh Circuit concluded that the "time of injury" in a hearing loss case is governed by Section 10(i), which is part of System Three. 933 F.2d at 1566-1568. In other words, the "time of injury" in those two circuits is when the claimant is or should be aware of the relationship between the employment, the disease and the disability, rather than the date of the claimant's last exposure on-the-job, as in the First Circuit. Compare *Alabama Dry Dock*, 933 F.2d at 1566-1567, with Pet. App. 14, 19.

In *Alabama Dry Dock* the court reasoned that, even if occupational hearing loss does not progress after

the worker leaves employment, the statute is silent concerning the "time of injury" that applies in such cases. 933 F.2d at 1566-1567. The court decided that Congress must have intended for System Three's "time of injury" standard to govern *all* cases involving occupational diseases, including hearing-loss cases, despite the fact that Section 10(i) refers only to those occupational diseases which do "not immediately result in death or disability." *Id.* at 1567-1568. In reaching that conclusion, the court stressed that the phrase "occupational disease which does not immediately result in death or disability," although mentioned three times in the statute, "is not explained, or indeed even mentioned, anywhere in the conference report or, so far as we can tell, elsewhere in the legislative history." *Id.* at 1567.[10] Of course, it is improper to ignore the statutory language on account of an absence of legislative history making clear that the statute should be applied as written. But in fact, the House Report accompanying the 1984 amendments fully supports the interpretation of this phrase urged by the Director and accepted by the First Circuit in this case. The Report states:

> A long-latency disease is described, both for the purpose of this section [Section 13(a)] and the section 12(a) amendments, to mean a disease which does not immediately result in death or disability. By this, the Committee means to describe disabling conditions which do not develop

[10] The court also found it significant that the discussion of Section 10(i) in the conference report, Conf. Rep. at 29-30, merely refers to claims involving occupational diseases and seemingly does not draw a distinction among occupational diseases. 933 F.2d at 1567. That is irrelevant, however, because the statutory language distinguishes between diseases that do not immediately result in disability (like asbestosis) and those that do (like occupational hearing loss).

> immediately after the initial change in the body of the worker resulting from the exposure to a toxic substance or harmful physical agent, or which do not even result in a change in the body immediately after the exposure to the causative toxic substance or harmful physical agent.

H.R. Rep. No. 570, 98th Cong., 1st Sess. 11 (1984).

c. The Board follows yet a third approach. In a hearing loss case, the Board determines "time of injury," and thus the applicable average weekly wage, under System Three, yet nevertheless uses the other parts of the formula set out in System One to calculate the award. Pet. App. 21-27. The Board's views are not entitled to deference, since the Board is not charged with administering the Act. *Potomac Elec. Power Co.*, 449 U.S. at 278 n.18.[11]

[11] A number of courts have held that the Director's statutory analysis, on the other hand, is entitled to deference, since the Director administers the Act. *Newport News Shipbuilding and Dry Dock* v. *Howard*, 904 F.2d 206, 208 (4th Cir. 1990); *McDonald* v. *Director, OWCP*, 897 F.2d 1510, 1512 (9th Cir. 1990); *Lollar* v. *Alabama By-Products Corp.*, 893 F.2d 1258, 1262 (11th Cir. 1990); and *Phillips* v. *Marine Concrete Structures, Inc.*, 877 F.2d 1231, 1235 (5th Cir. 1989). But other courts have refused to pay deference to the Director's analysis, particularly when the Director's statutory interpretation was developed in the course of litigation rather than "through the promulgation of regulations." *Director, OWCP* v. *General Dynamics Corp.*, 900 F.2d 506, 510 (2d Cir. 1990); see also *Sea-Land Service, Inc.* v. *Rock*, No. 91-3161 (3d Cir. Jan. 7, 1992), slip op. 7; and *American Ship Building Co.* v. *Director, OWCP*, 865 F.2d 727, 730 (6th Cir. 1989). In this case, deference is due the Director's construction of the statute because he has consistently interpreted the statute to call for the payment of occupational hearing loss benefits under System One rather than System Three. That is shown by 20 C.F.R. 702.212, which requires a hearing loss claimant

2. Thus, three competing—and conflicting—approaches may apply to calculating the benefits due to a retiree for an occupational hearing loss: (1) the First Circuit's and the Director's approach (System One applies in its entirety); (2) the Fifth Circuit's approach (System Three applies in its entirety); and (3) the Board's hybrid approach (System Three is used to determine the average weekly wage, but the formula set out in System One is used to calculate benefits).[12] This conflict undermines the Act's central goal of providing "nationwide uniformity" for claims brought by injured maritime workers. See *Director, OWCP* v. *Bethlehem Steel Corp.*, 949 F.2d 185, 187 (5th Cir. 1991), citing *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205 (1917).

The conflict is significant because of the large number of hearing loss claims brought by retired longshore and harbor workers. There are currently 6,855 open hearing loss cases at all levels of adjudication nationwide. Those cases represent approximately

---

to give notice of his injury within 30 days of the date of injury, which is specially defined in light of the 1984 amendments to System One as the date on which the claimant received an audiogram and accompanying report revealing an occupational hearing loss. The regulation does not provide for notice within one year of the date of awareness of an occupational disease that does "not immediately result in death or disability," as provided under System Three. The Director explained that a hearing loss claimant is not subject "to the extended time requirements applicable to occupational diseases that do not immediately result in disability or death, since a hearing loss could entitle an employee immediately to a schedule award of compensation" under System One. 50 Fed. Reg. 389 (1985).

[12] Since the Eleventh Circuit has decided that the "time of injury" is determined under System Three, it presumably would agree with the Fifth Circuit's approach, although it is possible that it would adopt the Board's hybrid approach.

eleven percent of all outstanding Longshore and Harbor Workers' Compensation Act claims. The Director does not maintain statistics that would conclusively show how many hearing loss claims are brought by retirees, as opposed to claimants who are still working, but in the Director's experience the clear majority of hearing loss claims are filed by retirees. There is also indirect evidence that a large number of claims are affected because, while the relevant Fifth and Eleventh Circuit cases were pending, hundreds of cases were held in abeyance at the Board level. Following the court's decisions, motions to have benefits recalculated have been filed in many of those cases. Thus, the conflict on the legal issue presented by this case has greatly disrupted, and most likely will continue to disrupt, the administrative process.

CONCLUSION

For the reasons set forth, we do not oppose the petition for a writ of certiorari.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

MAUREEN E. MAHONEY
Deputy Solicitor General

ALLEN H. FELDMAN
Associate Solicitor

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

KERRY L. ADAMS
Counsel for Appellate Litigation

ELIZABETH HOPKINS
Attorney
Department of Labor

MARCH 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45343